

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1506

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. T-8230

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

NICHOLAS SAIA,

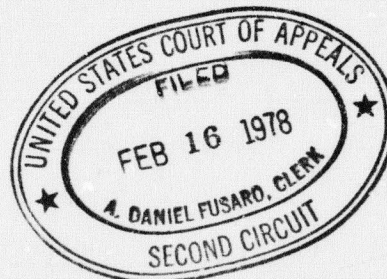
Defendant-Appellant.

On Appeal from the United
States District Court for the
Western District of New York.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal by the defendant, Nicholas Saia, from a judgment of conviction entered against him, in the United States District Court for the Western District of New York, on the 7th day of December, 1977.

By indictment, bearing number CR 74-191, returned the 19th day of June, 1974, appellant and one Salvatore Saia were charged with violations of Title 26 United States Code §§7201 and 7206. The first two counts of the six-count indictment charge violations of 18 U.S.C. 7201 based upon an alleged attempt to evade and defeat income tax due and owing by Empire Scrap Metals, Inc., a

New York Corporation, for the fiscal years ending August, 1966, and 1968, respectively.

Counts four through six of the indictment charge violations of Title 26 U.S.C. 7206(1). The basis of each of these counts being that appellant and his co-defendant willfully subscribed the corporate tax returns for the said Empire Scrap Metals, Inc. for the tax years ending August, 1965, August, 1966, August, 1967, and August, 1968, which said returns were signed under a written declaration that the signatures were made under penalty of perjury and that said returns were false in that they understated the gross receipts of the said Corporation for each of the tax years involved, and overstated business expenses for such years.

Subsequent to his arraignment upon the indictment herein and prior to the commencement of trial thereon, appellant moved this Court for an order suppressing the evidentiary use of various records and documents obtained by the Government as well as any statements made by appellant on the occasion of interviews had by Agents of the Internal Revenue Service with appellant on July 18, 1969, July 24, 1969 and September 16, 1969. By order of the Honorable John T. Curtin, Chief Judge of the Western District of New York, dated the 7th day of August, 1976, appellant's motion to suppress was denied in all respects.

Trial below commenced, before the Honorable John T. Curtin and Jury, on the 8th day of March, 1977. On the 29th day of March, 1977, a mistrial was declared as to the co-defendant, Salvatore Saia, by reason of said co-defendant having become ill.

Prior to the submission of the case to the Jury, the Court struck from the Jury's consideration those allegations contained in Counts three, four, five and six of the indictment which alleged overstated business expenses.

On the 7th day of April, 1977, the Jury returned a verdict of guilty against the defendant on all counts as charged in the indictment.

Appellant was sentenced on the 7th day of December, 1977, to a term of imprisonment of two years on each count, and by order of the Court below, such sentences are to run concurrently.

On the 9th day of December, 1977, appellant filed and served his notice of appeal to this Court.

STATEMENT OF FACTS

The charges embraced in the instant indictment arise out of the alleged tax liability of Empire Scrap Metals, Inc., a New York Corporation, for the tax years 1965 through 1968, inclusive, and the criminal liability of appellant is predicated upon his activities in connection with a preparation, execution and filing of the tax returns for those years.

The Empire corporation was on a fiscal year rather than a calendar year tax basis, and its fiscal year ended on the 31st day of August. The returns for the four years involved in the instant indictment, were delinquent returns and were filed in the Buffalo Office of the Internal Revenue Service on December 3, 1969.

Counts three through six of the indictment allege that in each of the respective fiscal years the stated gross receipts of Empire were in an amount as stated in that year's federal income tax return, and that appellant knew that such gross receipts were understated.

Counts one and two of the indictment allege for the fiscal years ending August 31, 1966, and August 31, 1968; the corporation reported no taxable income and no tax due, and that the corporation did in fact have taxable income and did in fact owe a tax, and that these facts were known to the appellant.

The theory of the Prosecution was that the gross receipts of the corporation were understated in each of the four tax years in question.

To establish this the Government introduced the tax returns for the four years in question (Government exhibits 1 through 4); records purporting to be the check and cash disbursements and sales journal of Empire for the tax years in question (Government's exhibits 6 through 9); a summary sheet prepared by the witness Richard Kamats, employed by the Accountant, Carl Justin, who testified that he prepared the delinquent returns in question. The Government then introduced testimony and documentary evidence purporting to show that the tax returns did not reflect certain sales made to alleged customers of defendant during the time period involved.

The Government called ten witnesses through whom it offered to prove that the business firm's represented by them made substantial purchases from Empire during the various tax years involved,

which said purchases were not reflected in either the purported books of Empire or the tax returns filed on its behalf.

In each case, the testimony developed on both direct and cross examination and the evidence as reflected in the documentary exhibits admitted, clearly shows that in a substantial number of cases, if not all of the cases involved, the records of the alleged supplier indicate that payment was made to one Joseph Ruggerio and not to the corporation or to appellant.

No direct testimony, nor documentary evidence, was offered to trace the funds from Ruggerio to the corporation. The connection between the said Ruggerio and the corporation and/or the appellant was sought to be established by the testimony of one Carrie Mae Grabiec (Transcript Vol. II p. 3-58). She testified that she was employed by Empire beginning in February, 1969. She also testified that Ruggerio worked for Empire while she was employed there. However, she was employed by Empire subsequent to the time period in question and specifically stated on cross examination that she had no knowledge of Ruggerio's employment prior to 1969 (Transcript Vol. II p. 44). The witness' testimony in this regard was admitted over objection and a subsequent motion to strike her testimony was overruled.

The other evidence offered to connect the said Ruggerio to the corporation was the testimony of Treasury Agent Vincent C. Dinatle, with regard to admissions concerning the said Ruggerio, which were made by appellant during interviews in July and September of 1969. (See Appendix A). These alleged admissions were sought to be suppressed in a pre-trial motion which was denied by the Court.

In addition to the evidence introduced for the purpose of establishing willful and knowing understatement of receipts, the only evidence offered as to appellant's culpability consisted of testimony of the witness Grabiec to the effect that during her brief tenure of employment in 1969, she was on occasion instructed to destroy certain sales slips (See Appendix B); this evidence was admitted over objection and a motion to strike the same was overruled.

The total amounts of understatement of gross receipts and amount of tax delinquencies for the years in question were established through the testimony of and exhibits prepared by Internal Revenue Agent John Cotter, who attended the entire trial and was the final witness called by the Government. In making his final calculations, the witness Cotter contributed all of the monies paid to the said Ruggerio as being income to the corporation. The importance of this witness to the Government's case is amply demonstrated by the opening and closing statements of the Prosecutor in regard to his role in the trial and the impact of his testimony. (See Appendix C and D).

STATEMENT OF ARGUMENT

The sine qua non in the establishment of the Government's case against appellant is truth beyond a reasonable doubt that the funds received by the said Ruggerio were alternately received by Empire and were not reflected as gross receipts in the income tax returns filed by Empire; and that appellant had knowledge of these facts and executed the tax returns and caused them to be

filed despite this knowledge. It is the position of appellant that on the evidence submitted there is an insufficient showing from which the jury could have made that necessary determination.

It is further submitted that the only evidence tending to prove the necessary connection between Ruggerio and the corporation and the appellant was the testimony of Agent Dinatale as to alleged admissions of appellant and the testimony of the witness Grabiec as to Ruggerio's status with the corporation subsequent to the time period embraced in the indictment. The admission of this testimony was error in that the Dinatale testimony should have been suppressed by reason of the fact that the admissions of appellant were obtained in violation of his constitutional rights in that the Treasury Department regulations as to advices and warnings to be given by Internal Revenue Agents, were ignored; and the testimony of the witness Grabiec was inadmissible on the ground of relevancy.

The errors occasioned by the admission of the Dinatale and Grabiec testimony in this regard, were compounded by the prejudice of the remainder of the Grabiec testimony and the prejudicial effect of both the opening and closing references made by the Prosecutor to the role and function of the Witness Cotter in the prosecution below.

POINT I

THE GUIDELINES PROMULGATED BY THE INTERNAL REVENUE SERVICE NEWS RELEASE NUMBER 897 AND 949, REQUIRING A SPECIAL AGENT TO ADVISE AN INTERVIEWEE WITH MIRANDA-TYPE WARNINGS, IS APPLICABLE WHEN THE INTERVIEWEE IS AN OFFICER OF A CORPORATION, AND FAILURE TO ADVISE SUCH OFFICER THAT HE MAY BE SUBJECT TO PERSONAL CRIMINAL LIABILITY, IS A VIOLATION OF HIS RIGHTS SUFFICIENT TO REQUIRE THE SUPPRESSION OF ANY ADMISSIONS MADE BY SUCH OFFICER.

The ruling of the Court below in denying appellant's motion to suppress admissions made in the presence of the witness Dinatale, was apparently based upon a finding that the interrogation producing the admissions was non-custodial, Beckwith v. United States, 96 S.Ct. 1612; and that appellant was not personally a target of an Internal Revenue Service investigation at the time.

That the interrogation was non-custodial is not per se dispositive of appellant's motion to suppress. The Internal Revenue Service has established its own guidelines published as news releases 897 and 949 requiring Miranda-type warnings where a tax payer is interviewed by a Special Agent.

Non compliance with such guidelines has been held to be action inconsistent with due process thus causing a motion to suppress to lie. United States v. Heffner, 420 F. 2d 809(4th Cir.); United States v. Dawson, 486 F. 2d 1326 (5th Cir.); United States v. Leahy, 434 F. 2d 7 (1st Cir.). It is clear from the trial testimony of Agent Dinatale and the suppression hearing testimony of Agent Como, who conducted the critical interviews here, that no warnings

as to the appellant's rights against self-incrimination were given. The thrust of the Agent's conversations with appellant was that an investigation was under way as to the non-filing of tax returns for the Empire corporation.

It is submitted that the principle that a corporation has no Fifth Amendment privilege, Hale v. Henkel, 201 U.S. 43; and the rule that the Internal Revenue Service guidelines do not apply to corporations, U.S. v. Maciel, 351 F. Supp. 817; do not militate against appellant's position. The only purpose which could be served by the questions asked of appellant, concerning the persons who had an interest in and who worked for Empire corporation, was the establishment of individual criminal liability growing out of the corporation's tax situation.

When a corporate officer is interviewed concerning delinquent taxes of the corporation, or other tax violation by the corporation, the Agents conducting such interview are aware that incriminatory statements may be made by the interviewee which will cause an effect his personal criminal liability. To fail to warn the individual under such circumstances, has the effect of lulling him into a false sense of security, making him believe that his answers can only affect corporate liability and thus the fundamental spirit of due process and of the Internal Revenue guidelines is ignored and frustrated.

To say that there was no investigation pending against appellant at the time he made the statements, which were so effectively used against him on his trial, is to ignore the reality of a tax investigation and make a mockery out of the guidelines promulgated

to protect an individual's rights.

It is recognized that a routine tax investigation always has possible criminal overtones and that when such an inquiry becomes criminal in nature, Fifth Amendment objections become relevant. See United States v. Prudden, 424 F. 2d 1021 (5th. Cir.); United States v. Roundtree, 420 F. 2d 845 (5th Cir.). It is submitted that a routine tax investigation becomes criminal in nature when the questions asked go beyond routine inquiry and zero in on information which would only be important and necessary if criminal prosecution was sought. In the instant case, questions as to Ruggerio's involvement with the corporation can only have import in a criminal proceeding against either himself or the appellant. Therefore, the failure of the Internal Revenue Agents to advise the appellant as to his right not to answer, at the point of making these inquiries, constituted trickery and deceit on the part of the Internal Revenue Agents and thus, the evidence obtained during these conversations should have been suppressed.

POINT II

EVIDENCE OF A BUSINESS PRACTICE, ROUTINE OR HABIT IS INADMISSIBLE, AS IRRELEVANT, TO ESTABLISH AN EVIDENTIARY FACT, ABSENT A SHOWING THAT SUCH PRACTICE, ROUTINE OR HABIT WAS IN EXISTENCE AT THE TIME OF THE OCCURRENCE OF SUCH EVIDENTIARY FACT. THE ADMISSIBILITY OF SUCH EVIDENCE IS SUBJECT TO THE FURTHER REQUIREMENT THAT ITS PROBATIVE VALUE MUST SUBSTANTIALLY OUTWEIGH THE PREJUDICIAL EFFECT ITS RECEIPT MAY HAVE UPON THE DEFENDANT.

The testimony of the witness Grabiec was crucial to the Government's case. She testified that during the time of her employment as a bookkeeper for Empire, in 1969, that the said Ruggerio was an employee. She also testified that during this period she destroyed some sales slips and altered expense slips, at the direction of the appellant. Her testimony was objected to and was also the subject of a motion to strike. The objections and the motion to strike were overruled.

Assuming that the witness' testimonial conclusion as to the employment of Ruggerio in 1969 was justified by the evidence, it cannot be inferred therefrom that the said Ruggerio was an employee of the corporation prior to August 31, 1968, the material time period in this indictment.

While the witness' testimony as to her activities in regard to sales records of the corporation shows that some of this activity occurred in regard to sales slips within the tax years in question, it is submitted that all of her testimony in this regard should have been disallowed.

There was no showing that the alleged instructions which she received from appellant in 1969 were the continuation of a practice in effect prior to that time, and, therefore, the provisions of Rule 406 of the Federal Rules of Evidence cannot apply since the purpose of that Rule is to allow an inference to be taken that something happened because it was routine for it to happen. This presupposes that the routine was in existence at the time of the alleged event.

As to her testimony in regard to the 1965 slips, it is submitted that Rule 403 of the Federal Rules of Evidence mandates the inadmissibility thereof. By this rule relevancy is not the only test of admissibility and evidence even though relevant, is excludable if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues.

The witness' testimony as to her activity in regard to the records of the corporation for the material years, is indefinite as to amounts, numbers of slips involved, and specific time periods involved. Her statements on cross examination clearly show that the effect of her action upon the ultimate tax liability of the corporation is at best conjectural. Thus the probative value of this evidence is minimal.

On the record in the instant case; however, this testimony and the evidence purportedly linking the said Ruggerio to the corporation, is the only evidence upon which the criminal liability of the appellant can be predicated. Therefore, the extreme prejudice of this testimony is clearly manifested by the record and is compounded by the fact that some of the testimony applies to the

allegation of overstating expenses, which said allegation was removed from the consideration of the jury but the testimony of the witness Grabiec was not in that regard.

POINT III

WHERE THE TESTIMONY OF A PARTICULAR WITNESS IS CRITICAL TO THE PROOF OF THE PROSECUTION'S CASE, REMARKS CONTAINED IN THE OPENING AND CLOSING STATEMENTS OF THE GOVERNMENT'S ATTORNEY, WHICH ARE CALCULATED TO CAUSE THE JURY TO GIVE SPECIAL WEIGHT AND UNDUE CREDIBILITY TO SUCH WITNESS, CONSTITUTE REVERSIBLE ERROR IN ABSENCE OF OBJECTION.

The Government's case depended upon the establishment of the ultimate fact that a material false statement was made in each of the questioned returns. To establish this ultimate fact it was incumbent upon the Government to prove an understatement of receipts and establish that that understatement effectively changed the corporation's tax picture.

To graphically demonstrate this, the Government relied upon the testimony of Internal Revenue Agent Cotter, who sat as a spectator throughout the trial and prepared an exhibit in which he calculated the alleged understatement of receipts as testified to by the various witnesses.

The importance that the Government placed upon this witness is evidenced by remarks made in both the opening and closing statement of the Prosecutor.

At the conclusion of his opening the United States Attorney

stated as follows:

You may still feel a bit apprehensive about all the documents. Well, we have someone here who is going to help you. You see back in the courtroom there an individual seated and his name is John Cotter. Mr. Cotter, at the end of all the Government's proof will take the stand and he will help you wade through the evidence. He is a Revenue Agent and he has been doing this for approximately 15 years. He has studied accounting in school and he does this type of thing for a living and he will show you, he will guide you more or less through all this maze of checks and invoices and accounting records. (Trial Transcript Vol. I, p.26-27) (Appendix C)

In his closing statement, the United States Attorney made the following comment:

Now let's look at what else the Government must prove. Well, must prove the returns were false and fraudulent or contained material misstatements. As I have stated before Mr. Cotter showed you them and we have gone through the amounts a sufficient number of times. Let's comment on the schedule for a second because as you have heard, Mr. Cotter's function in this trial was to be a guide through the evidence to help you people go through the evidence and you have to understand what Mr. Cotter did in order to enable him to be that guide. (Trial Transcript Vol. I, p. 216) (Appendix D)

It is submitted that these two statements taken in the context of the entire proceeding below, paint the witness Cotter to be an impartial person, just doing his job, a job he is eminently well qualified for, and a job which consists of helping the Jury. Had the Prosecutor specifically said that the witness was to be considered as an impartial adjunct of the Court, there is no question that these remarks would have constituted prejudicial error.

We submit, however, that the remarks made are more insidious when taken in the light of all of the testimony and when the calculations testified to by the witness specifically included the checks made payable to the said Ruggerio, the probability of the Jury or a substantial number of Jurors to rely upon the figures given by the witness Cotter and assume, based upon his testimony in that regard, that Ruggerio was in fact an Agent of the corporation and did in fact turn the funds over to the corporation, is so high that despite the failure of counsel below to object, these comments must be considered to be plain error, demanding a reversal.

POINT IV

THE VERDICT BELOW WAS CONTRARY TO THE WEIGHT OF EVIDENCE IN THAT THE GOVERNMENT DID NOT ESTABLISH ITS BURDEN TO PROVE EACH AND EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

The ultimate fact relied upon by the Government in its attempt to establish the appellant's guilt, is that the monies paid by various alleged customers of Empire, were received by the corporation even though those monies were paid to the said Ruggerio; and that this receipt was with the knowledge of appellant. There was no direct evidence to this fact and the evidentiary facts from which the inference had to be drawn, were the admissions attributed to appellant, the testimony of the witness Grabiec and testimony of some of the suppliers in connection with some of the Ruggerio transactions to the effect that the name Empire or Saia also appear-

ed in their records.

The alleged admissions of appellant when taken most favorable to the Government are equivocal at best and do not establish that the said Ruggerio was the agent for the corporation at all times where checks were made payable to him, and even if this inference can be drawn, it would stretch the Rule as to circumstantial evidence to the breaking point if we were to infer from that that the monies were actually paid to the corporation by the said Ruggerio.

The testimony of the witness Grabiec is neither logically nor legally relevant to establishing Ruggerio's employment during the time period in question; but assuming its relevancy for the sake of argument, it is submitted that that testimony too is so equivocal as to make it an improper foundation upon which to infer that which the Jury must have inferred therefrom.

This failure of the Government's proof magnifies the error created by the improper statements of the Prosecutor in his opening and closing address, since it crystalizes the importance that the Jury must have placed upon the testimony of the witness Cotter, an importance which was undue and insinuated in the minds of the Jury that improper conduct.

CONCLUSION

Eased upon the foregoing, it is respectfully submitted that the conviction below must in all respects be reversed.

Respectfully submitted,

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FOR THE SECOND CIRCUIT

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vs

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Defendant-Appellant

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Docket No. T-8230

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

SALTEN RODENBERG, being duly sworn, deposes and says:

That on the 15th day of February, 1978, he served three copies of appellant's brief and three copies of appellant's appendix on the United States Attorney's Office, United States Courthouse, Buffalo, New York.

Salten Rodenberg
Salten Rodenberg

Sworn to before me this

15th day of February, 1978.

James J. Swartz
Comm. of Deeds, Buffalo, New York
My Comm. Expires December 31, 1978.